DEFENSE LEGAL SERVICES

EXHIBIT AW-50

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WASHINGTON, D.C. 20301

In reply refer to:
I-000443/87

January 21, 1987

MEMORANDUM FOR THE DIRECTOR, DSAA

SUBJECT: Arms Sales to Iran

This responds to your request for a legal analysis of the U.S. laws applicable to the transfers of defense articles to Iran as have been publicly disclosed over the last ten weeks or so. Since we have no factual information concerning these transfers, this analysis proceeds on the assumption that the facts of the matter as alleged in the press are true. Issues concerning the commission of crimes, if any, or the receipt and application of funds for such transfers are beyond the scope of your request. Questions concerning the lawful roles of various Executive Branch agencies or international terrorism policy are likewise generally excluded from this analysis.

The arms transfers to Iran that are the subject of this memorandum appear to fall into two categories. First, transfers of defense articles originally sold to the Government of Israel under the Arms Export Control Act by the U.S. Government or under munitions export license by private United States firms. These transfers were apparently made by the Government of Israel, directly or indirectly, to the Government of Iran in the latter half of calendar year 1985. U.S. Government approval ("prior consent") or condonation ("after-the-fact acceptance") of these Israeli transfers was allegedly involved as well as a commitment by the U.S. Government to replace the defense articles transferred with substitute items in order to maintain the readiness of Israeli defense forces. Second, transfers of defense articles by the U.S. Government, directly or indirectly, to the Government of Iran during the first ten months of calendar year 1986. These transfers were apparently made by the Central Intelligence Agency (CIA) under a Presidential finding on January 17, 1986, authorizing such transfers. The defense articles transferred by the CIA were obtained in whole or in part from DoD stocks by the CIA under the Economy Act of 1932, as amended, prior to their transfer to Iran.

I. Israeli Transfers to Iran

Defense articles are authorized to be sold under the Arms Export Control Act (AECA) for only five purposes spelled out in section 4 AECA: internal security of the purchaser; legitimate self-defense of the purchaser; regional or collective arrangements or measures in which the purchaser participates; United

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Nations collective measures in which the purchaser participates; and military civic action activities in which the military forces of the purchaser participate. Sales are not authorized to be made to enable the purchaser to retransfer the items sold to another party, governmental or otherwise. An exception to the last statement is recognized in the case of intra-NATO lead-nation procurement by paragraph (4)(C) of subsection 3(d) AECA. It is, nevertheless, correct to say that foreign military sales (FMS) may not legally be made by the U.S. Government if the purpose of the sale is known at the time of the sale to be the retransfer, by sale or otherwise, to any other party outside the NATO Alliance. A commitment by the U.S. Government to replace defense articles in Israeli stocks through the FMS program with the actual knowledge that the shortages in such stocks would result from Israeli third-party transfers of items sold originally under FMS to Israel is inconsistent with the spirit of section 4 AECA, even assuming lawful prior U.S. consent to such third-party transfers. The situation may, however, be ameliorated if prior Congressional notice of the circumstances involved in the proposed third-party transfer and resupply were made under section 3(d) AECA and section 36(b)(1) AECA. This is so because the AECA emphasizes the desire of the Congress for oversight of "bilateral" arms transfer decisions by the U.S. Gvoernment vis-a-vis each foreign recipient. In the event that the dollar values involved in the third-party transfer and resupply do not meet or exceed the threshholds specified in section 3(d) ACEA and section 36(b)(1) AECA, Congressional notification is inappropriate and no legal basis for the combined operation is available. In such circumstances an FMS transaction directly with the "third-party" is required.

A variation of the above analysis may be found where the defense articles are exported by private United States firms under munitions export license authority pursuant to section 38 AECA. The International Traffic in Arms Regulations (ITARs) require the exporter to declare on its export license application the "country of ultimate destination" and, in the case of a foreign manufacturing agreement, the "sales territory" in which the manufactured items may be sold. Congressional notification requirements for third-party transfers of such items and for export of them from the United States are found in section 3(d)(3) AECA and section 36(c)(1) AECA. The ITARs themselves specify the conditions under which prior U.S. Government consent is required for retransfers of items exported thereunder.

Defense articles sold under the FMS program by the U.S. Government must be sold subject to the conditions set forth in section 3(a)(2) AECA, i.e., that the purchaser agree not to transfer them to "anyone not an officer, employee, or agent" of the purchaser "unless the consent of the President has first been

obtained." The actual sales contract clarifies that the consent must be "written" (paragraph B.9, Annex A, DD Form 1513) as well as prior to the transfer. If Israel transferred items to Iran without the prior consent of the President, section 3(e) AECA requires that any information to that effect be reported "immediately" to the Congress. This responsibility has been delegated to the Secretary of State by Executive Order 11958. Moreover, section 3(c) AECA would, in that event, make Israel ineligible for additional FMS credits unless neither the President nor the Congress by joint resolution determined that a "substantial violation" occurred. Cash sales and deliveries of previous FMS to Israel would be terminated in the event it is determined under similar conditions that a "substantial violation" occurred in using the items for a purpose "not authorized under section 4."

However, if Israel sought the written consent of the President (or the Secretary of State to whom this function is also delegated by Executive Order 11958) prior to the transfer to Iran, section 3(a) AECA requires that consent be withheld until the proposed recipient foreign country (i.e., Iran) "provides a commitment in writing to the United States Government that it will not transfer such defense articles, if not demilitarized, to any other foreign country or person without first obtaining the consent of the President." Moreover, the last paragraph of section 3(a) AECA prohibits the President from giving his consent to a third-party transfer "unless the United States itself would transfer the defense article under consideration to that country." Congress is thereby prohibiting the transfer of defense items <u>indirectly</u> if the United States would not -- for legal or policy reasons -- itself transfer them <u>directly</u>. The United States maintains a policy of strict neutrality towards Iran and Iraq as regards their conflict and conducts a campaign, publicly and privately, against military supplies for either belligerent. Iranian Foreign Asset Control Regulations, issued pursuant to various Executive Orders, strictly prohibit financial transactions with Iran except under Treasury license. Finally, the U.S. Government has repeatedly identified Iran as engaged in "state-supported international terrorism." Section 3(f) AECA prohibits FMS directly to "any government which aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism." The Iranian government has apparently strong influence over certain terrorist groups in Lebanon and may have afforded them "sanctuary" within the meaning of section 3(f) AECA. There are, thus, several bases -- legal and policy bases -- on which one must analyze the legality of any prior written consent to transfer FMS-origin items to Iran, if indeed there was such consent. On the other hand, assuming that the United States

Government shortly thereafter made sales of military items of similar capabilities itself to Iran, it may be argued that the statutory test was demonstrably met in that "the United States itself would transfer the defense article under consideration to that country." No Iranian retransfer assurances were, of course, obtained by the U.S. Government in writing. This conclusion leads one to opine that the Israeli transfers to Iran during the latter half of calendar year 1985 were made without the prior written consent of the United States Government.

II. CIA Transfers to Iran

DoD stocks of defense articles are authorized to be sold to "any eligible country" under certain conditions set out in section 21(a) AECA. Iran was made eligible by the President for FMS by a formal determination reaffirming its eligibility on January 2, 1973 (38 Fed. Reg. 7211; 3 CFR (1971-1975 Comp.) 1105) pursuant to section 3(a) AECA:

> "SEC. 3. Eligibility.--(a) No defense article or defense service shall be sold or leased by the United States Government under this act to any country ... unless--
> "(1) the President finds that the furnishing of defense articles and defense services to such country ... will strengthen the security of the United States and promote world peace;
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> * * *
>
> "(4) the country ... is otherwise eligible to purchase or lease defense articles or defense services." (emphasis added.)

As noted above, there is substantial question as to whether Iran was "otherwise eligible" in 1986 for FMS based upon, inter alia, its support of international terrorism within the meaning of section 3(f) AECA. However, the prohibition in section 3(a) AECA that is quoted above is limited to sales made under the Arms Export Control Act. Similarly, the detailed rules pertaining to FMS throughout the AECA, e.g., section 36(b)(1) AECA, are quite rightly limited to sales made under that act.

The transfers to Iran in 1986 were apparently made by the CIA under a different authority. Section 662 of the Foreign Assistance Act of 1961, as amended, provides:

> "SEC. 662. Limitation on Intelligence Activities.--No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the

Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947."

Section 501 of the National Security Act of 1947, referred to above, provides in pertinent part:

"SEC. 501. Congressional oversight

"(a) Reports to Congressional Committees of current and proposed activities

"To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, ... the Director of Central Intelligence ... shall--

"(1) Keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives ... fully and currently informed of all intelligence activities ... including any significant anticipated intelligence activity, except that ... if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

* * *

"(b) Failure to inform; reasons

"The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice.

"(c) Establishment of procedures for relaying information

"The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of subsections (a) and (b) of this section." (emphasis added.)

Until 1985 there were disputes concerning the statutory authority of the CIA to transfer military items to foreign governments outside the Arms Export Control Act and the Foreign Assistance Act of 1961 and, in particular, whether such transfers could legally be considered to form a part of a "significant anticipated intelligence activity" within the meaning of section 662 of the Foreign Assistance Act of 1961 and section 501 of the National Security Act of 1947. These disputes were settled with the enactment on December 4, 1985, of section 403 of the Intelligence Authorization Act for Fiscal Year 1986 (P.L. 99-169, 99 Stat. 1002, 1006). That section read:

"Notice to Congress of Certain Transfers of Defense Articles and Defense Services

"SEC. 403. (a)(1) During fiscal year 1986, the transfer of a defense article or defense service exceeding $1,000,000 in value by an intelligence agency to a recipient outside that agency shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947." (emphasis added.)

Paragraph (2) of section 403 of P.L. 99-169 provided that paragraph (1) did not apply if the transfer "is being made pursuant to authorities" contained in security assistance legislation or if the transfer "is not being made in conjunction with an intelligence or intelligence-related activity." The provisions of section 403 were made permanent and a part of the National Security Act of 1947 by section 602 of the Intelligence Authorization Act for Fiscal Year 1987 (P.L. 99-569, October 27, 1986).

Thus, the Presidential finding of January 17, 1986, apparently authorized the CIA to transfer defense articles of a value in excess of $1 million each to Iran, subject to the notification requirements of section 501 of the National Security Act of 1947. To the extent that the value of each defense article was less than $1 million, section 662 of the Foreign Assistance Act of 1961 appears to treat its transfer also, as a significant anticipated intelligence activity.

The CIA purchased some or all of the defense articles involved from DoD stocks pursuant to the Economy Act of 1932, as amended (31 USC 1535, 1536) based upon their "actual value." The CIA's authority in this regard is expressly recognized by section 502(a)(4) of the National Security Act of 1947, enacted by section 401 of the Intelligence Authorization Act for Fiscal Year 1986 (P.L. 99-169, Dec. 4, 1985, 99 Stat. 1002,1005).

It should be noted parenthetically that apparently all but the last of the CIA transfers to Iran occurred before August 27, 1986, when the Omnibus Diplomatic Security and Antiterrorism Act of 1986 was enacted. Section 509 of this Act (P.L. 99-399, 100 Stat. 853, 874) added a new section 40 AECA that specifically prohibits export of Munitions List items to countries that repeatedly provide support for acts of international terrorism; Iran has been so designated. The press has reported that the Department of State suggested to the Congress that section 40 AECA does not nullify the Presidential finding with regard to Iran made on January 17, 1986.

Jerome H. Silber

Atchs:
FMS Eligibility Determination, 1973
Sec. 40 AECA

Presidential Documents

Title 3—The President

MEMORANDUM OF JANUARY 2, 1973

[Presidential Determination No. 73-10]

Eligibility for the Purchase of Defense Articles Under the Foreign Military Sales Act, As Amended

Memorandum for the Secretary of State

THE WHITE HOUSE,
Washington, January 2, 1973.

In accordance with the recommendations in your memorandum of December 4, I hereby find pursuant to Section 3(a)(1) of the Foreign Military Sales Act, as amended, that the sale of defense articles and defense services to: *FAR EAST:* Australia, Brunei, Burma, Cambodia, Republic of China, Indonesia, Japan, Republic of Korea, Laos, Malaysia, New Zealand, Philippines, Singapore, Thailand, Republic of South Vietnam; *EUROPE:* Austria, Belgium, Denmark, Finland, France, Federal Republic of Germany, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, Yugoslavia; *WESTERN HEMISPHERE:* Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, Venezuela; *AFRICA:* Cameroon, Dahomey, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Liberia, Libya, Mali, Morocco, Niger, Nigeria, Senegal, Tunisia, Upper Volta, Republic of Zaire; *NEAR EAST AND SOUTH ASIA:* Afghanistan, Bahrain, Greece, India, Iran, Israel, Jordan, Kuwait, Lebanon, Nepal, Oman, Qatar, Pakistan, Saudi Arabia, Sri Lanka (Ceylon), Turkey, the United Arab Emirates, Yemen Arab Republic; *INTERNATIONAL ORGANIZATIONS:* NATO and its agencies, the United Nations and its agencies, and the Organization of American States, will strengthen the security of the United States and promote world peace.

In the implementation of Section 9 of Public Law 91-672, as amended, you are authorized on my behalf to determine whether the proposed transfer of a defense article by a foreign country or international organization to any foreign country or international organization

not included in the foregoing enumeration will strengthen the security of the United States and promote world peace.

In order that the Congress may be informed of the implementation of the Foreign Military Sales Act, you are requested on my behalf to report this finding to the Speaker of the House of Representatives and to the Chairman of the Senate Foreign Relations Committee.

Richard Nixon

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equipment and commodities, and training in the use of such equipment and commodities. The authority contained in this section shall be exercised by the Department of State's office responsible for administering chapter 8 of part II of the Foreign Assistance Act of 1961, in coordination with the Agency for International Development.

22 USC 2349aa.

SEC. 569. EXPORTS TO COUNTRIES SUPPORTING ACTS OF INTERNATIONAL TERRORISM.

(a) ITEMS ON THE MUNITIONS LIST.—Chapter 2 of the Arms Export Control Act (22 U.S.C. 2771-2779) is amended by adding at the end thereof the following new section:

22 USC 2780.

"SEC. 40. EXPORTS TO COUNTRIES SUPPORTING ACTS OF INTERNATIONAL TERRORISM.

"(a) PROHIBITION.—Except as provided in subsection (b), items on the United States Munitions List may not be exported to any country which the Secretary of State has determined, for purposes of section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)), has repeatedly provided support for acts of international terrorism.

President of U.S. Reports.

"(b) WAIVER.—The President may waive the prohibition contained in subsection (a) in the case of a particular export if the President determines that the export is important to the national interests of the United States and submits to the Congress a report justifying that determination and describing the proposed export. Any such waiver shall expire at the end of 90 days after it is granted unless the Congress enacts a law extending the waiver.".

(b) OTHER GOODS AND TECHNOLOGY.—Section 6(j)(1) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)) is amended by striking out "$7,000,000" and inserting in lieu thereof "$1,000,000".

TITLE VI—INTERNATIONAL NUCLEAR TERRORISM

22 USC 2341.

SEC. 601. ACTIONS TO COMBAT INTERNATIONAL NUCLEAR TERRORISM.

(a) ACTIONS TO BE TAKEN BY THE PRESIDENT.—The Congress hereby directs the President—

(1) to seek universal adherence to the Convention on the Physical Protection of Nuclear Material;

(2) to—

(A) conduct a review, enlisting the participation of all relevant departments and agencies of the Government, to determine whether the recommendations on Physical Protection of Nuclear Material published by the International Atomic Energy Agency are adequate to deter theft, sabotage, and the use of nuclear facilities and materials in acts of international terrorism, and

(B) transmit the results of this review to the Director-General of the International Atomic Energy Agency;

(3) to take, in concert with United States allies and other countries, such steps as may be necessary—

(A) to keep to a minimum the amount of weapons-grade nuclear material in international transit, and

(B) to ensure that when any such material is transported internationally, it is under the most effective means for adequately protecting it from acts or attempted acts of sabotage or theft by terrorist groups or nations; and

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A. Could the FMS or commercial licensing system have been used to make these sales - with or without Congressional notification?

- Sales can only be made by the USG to foreign countries and international organizations that the President formally determines to be eligible for sales because "the furnishing of defense articles and defense services to such country or international organization will strengthen the security of the United States and promote world peace."

- Sales can only be made for one or more of the following purposes: (1) internal security; (2) legitimate self-defense; (3) military civic action; (4) participation in regional or collective arrangements consistent with the UN Charter; and (5) participation in collective measures requested by the UN.

- The purchaser must agree not to transfer title to (or possession of) the sold items to any third party or to use them for purposes other than those for which furnished without the prior consent of the President (the actual sales contract requires that the consent be in writing).

- The purchaser must agree to maintain the security of the items sold.

- The purchaser must agree to pay for the items sold in U.S. dollars -- generally in advance of delivery from DoD stocks or at such times as DoD requires such payments in order to make payments on a DoD procurement contract.

B. What are the prohibitions to sales?

- Sales may not be made by the USG if the purchaser requires in performance of the sales discrimination against any U.S. person on the basis of race, religion, national origin, or sex.

- Sales may not be made if USG or contractor personnel are to perform any duties of a combatant nature, including any duties related to training or advising that may engage U.S. personnel in combat activities, outside the United States.

- Sales may not be made to any government which "aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism."

- Sales may not be made to any economically less developed country diverting U.S. development assistance or its own resources to "unnecessary military expenditures."

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- Sales may not be made unless the Congress is given prior notification of the proposed sales if the sales is worth $50 million or more ($14 million or more of major defense equipment) -- and the Congress does not enact a law prohibiting the notified sales within a specified time period.

C. What are the requirements for third party transfers?

- The President (or the Secretary of State by delegation of authority) must give prior written consent to any proposed transfer of the items sold by any purchaser to any person, firm, or government that is not the purchaser's "officer, employee, or agent."

- Consent to transfer may not be given "unless the United States itself would transfer the defense article under consideration" to that third party.

- Transfers of significant defense articles may not be consented to unless (1) the foreign country requesting consent to transfer agrees to demilitarize such defense articles prior to transfer, or (2) the proposed recipient foreign country provides a commitment in writing to the USG that it will not transfer such items, if not demilitarized, to any other foreign country or person without first obtaining the consent of the President.

D. Regarding third party transfers, what are the requirements for Congressional notification?

- Before consent to transfer may be given, the Congress must first be notified of the proposed transfer -- and the Congress does not enact a law prohibiting the notified transfer within a specified time period -- in those cases where the transfer is of items originally worth $50 million or more ($14 million or more of major defense equipment).

E. Are there any proposed transfers to third parties that do not require prior Congressional notification?

- Yes, if the transferred items are below the dollar threshholds listed above). However, even in those cases the President must give prior written consent to the purchaser and must obtain the required written retransfer assurances from the third country.

- No Congressional notification is required in the case of transfers either on a temporary basis for the sole purpose of maintenance, repair, or overhaul or if they involve NATO cooperative cross servicing or intra-NATO lead-nation procurement (and so previously notified to the Congress if above notification threshholds).

F. Regarding proposed USG sales to foreign countries and international organizations of $50 million or more ($14 million or more if major defense equipment), what must the Congress be told about the proposed sale?

- Each notification must identify the purchaser, the dollar amount of the sale and the quantity, a description of the item to be sold, the military department proposing to make the sale, whether and the amount of any agents' fees or contributions to be made to promote the sale, and the sensitivity of technology proposed to be sold and a detailed justification of the reasons necessitating the sale in view of the sensitivity of such technology. A cross-reference to any prior quarterly report to the Congress on price and availability given pertaining to the proposed sale must also be included in the notification.

- At the request of either the Senate Foreign Relations Committee or the House Foreign Affairs Committee, additional very detailed information must be supplied concerning the proposed sale.

G. Regarding F. above, are there any circumstances which may require additional notification to the Congress about the same sale?

- Yes, if the fundamental nature of the proposed sale is altered by the Executive Branch after notification and before the sale is actually offered and accepted or if the estimated price or other conditions are substantially different than that notified when the sales contract is mad

- Further notification or report must be made to the Congress the sensitivity of technology or capability as described in the original notification is to be enhanced or upgraded prior to delivery. If the cost of the enhancement or upgrade is above the original notification threshholds, the notification must be made before the change is put on contract or otherwise implemented -- and the Congress does enact a law prohibiting the notified enhancement or upgrade within a specified time period.

H. Are there any differences with regard to Congressional notification between USG proposed sales and proposed direct commerci exports?

- Direct commercial contracts may be made without prior Congressional notification; only exports in implementation of such contracts may be notified to Congress and then only i above dollar threshholds.

- The information supplied to the Congress on direct commerc exports is much less comprehensive and detailed than that vided regarding USG sales.

- Congress is not afforded a specified time period in which